(8) (7)

Nos. 89-1433 and 89-1434

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL., APPELLEES

UNITED STATES OF AMERICA, APPELLANT

v.

MARK J. HAGGERTY, ET AL., APPELLEES

On Appeals from the United States District Court for the District of Columbia and the United States District Court for the Western District of Washington

---

BRIEF FOR SENATOR JOSEPH R. BIDEN, JR., AS AMICUS CURIAE IN SUPPORT OF REVERSAL

KENNETH S. GELLER
Counsel of Record
ANDREW J. PINCUS
ROY T. ENGLERT, JR.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. § 700, as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES—Continued

Constitution and Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL., APPELLEES

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK J. HAGGERTY, ET AL., APPELLEES

On Appeals from the United States District Court for the District of Columbia and the United States District Court for the Western District of Washington

---

BRIEF FOR SENATOR JOSEPH R. BIDEN, JR., AS AMICUS CURIAE IN SUPPORT OF REVERSAL

INTEREST OF THE AMICUS CURIAE

This case concerns the constitutionality of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777. As Chairman of the Senate Judiciary Committee, amicus curiae Senator Joseph R. Biden, Jr. played a major role in the drafting and passage of that statute. Based on the proceedings before his Committee, Senator Biden concluded that content-neutral legislation protecting the integrity of the American flag would serve an important governmental purpose and would not be invalid under the First Amendment. Senator Biden thus

has a strong interest in presenting his views to the Court in defense of the constitutionality of the Act.

STATEMENT

1. On June 21, 1989, this Court, by a vote of 5-4, held unconstitutional a Texas statute that prohibited any person from intentionally or knowingly defacing, damaging, or otherwise physically mistreating a state or national flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09(b) (1989). *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989). Writing for the majority, Justice Brennan stated that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Texas statute violated this principle because it was "not aimed at protecting the physical integrity of the flag in all circumstances, but [was] designed instead to protect it only against impairments that would cause serious offense to others." *Id.* at 2543. Thus, "[w]hether Johnson's treatment of the flag violated Texas law * * * depended on the likely communicative impact of his expressive conduct." *Ibid.* In sum, "Johnson's political expression was restricted because of the content of the message he conveyed." *Ibid.*

In striking down the Texas law, the Court emphasized that its decision was "bounded by the particular facts of this case and by the statute under which Johnson was convicted." *Johnson*, 109 S. Ct. at 2544 n.8. Specifically, the Court did not dispute that "there is a special place reserved for the flag in this Nation, and thus we do not doubt that the Government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country.'" *Id.* at 2547 (quoting *Spence* v. *Washington*, 418 U.S. 405, 412 (1974)). Nor did the Court suggest that a statute would be invalid if it were "aimed at protecting the physical integrity of

the flag in all circumstances." *Id.* at 2543 & n.6 (citing *Smith* v. *Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting)). But "[t]o say that the Government has an interest in encouraging proper treatment of the flag * * * is not to say that it may criminally punish a person for burning a flag as a means of political protest." *Johnson*, 109 S. Ct. at 2547.

2. For nearly 200 years, Congress has passed laws relating to the design, treatment, and integrity of the American flag. See, *e.g.*, Act of January 13, 1794, ch. 1, 1 Stat. 341; Act of April 4, 1818, ch. 34, 3 Stat. 415. In 1968, concerned that federal law, unlike the laws of most states, did not prohibit the physical destruction of the flag, Congress adopted a flag protection law. The federal statute made it a crime "knowingly [to] cast[] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." 18 U.S.C. § 700(a) (1982). The Senate Report urged passage of this legislation on the ground that "[p]ublic burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation. Its prohibition imposes no substantial burden on anyone." S. Rep. No. 1287, 90th Cong., 2d Sess. 2 (1968); see also H.R. Rep. No. 350, 90th Cong., 1st Sess. 1 (1967).

This Court's decision in *Johnson* called into question the constitutionality of the federal flag protection statute. Accordingly, within days of the decision, numerous proposals were introduced in the Senate and House of Representatives either to amend the federal statute or to amend the Constitution. See S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989).

During the next several months, the Senate Judiciary Committee received extensive testimony with respect to the appropriate means of protecting the integrity of the American flag. See *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate*

Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) [hereinafter *Senate Hearings*]. The Committee heard "testimony from a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans, as well as from" Members of Congress and from the Department of Justice. S. Rep. No. 152, *supra*, at 6. These witnesses convinced the Committee that, as Dean Geoffrey R. Stone remarked, "[t]he Court did not hold [in *Johnson*] that there is an inviolable First Amendment right to burn the American flag" (*Senate Hearings* 192) and that it was possible to draft a flag protection statute that would satisfy constitutional standards.

The Senate Report explained that "the existing Federal statute, 18 U.S.C. 700, does not make it a crime to burn or destroy the flag. Rather, the current law makes it a crime for anyone to 'knowingly cast[] contempt' upon a flag of the United States by 'publicly mutilating, defacing, defiling, burning or trampling upon' it." S. Rep. No. 152, *supra*, at 9. Therefore, "the fatal flaw in the Texas statute as well as in the existing Federal statute is that the commission of the crime is inextricably linked to the communication of an idea. Under Texas law, the gravamen of the violation was 'serious offense;' under current Federal law, the gravamen of the violation is 'cast[ing] contempt.' Both laws are content-based, both would be subject to 'the most exacting scrutiny' by the Court and both conflict with the first amendment." *Id.* at 9-10.

S. 1338, the Senate bill, sought to remedy this defect by deleting the requirements in Section 700 that the actor have "cast contempt upon" the flag or have acted "publicly." As the Senate Report noted:

> Prosecution under the amended law would not in any way depend on the reaction of observers to the conduct. Put simply, commission of the crime would not be linked to the communication of any idea—indeed, the statute would apply regardless of whether the actor intends to communicate an idea. Operation of S. 1338, therefore, does not depend on whether a flag is being burned or otherwise destroyed for communicative or non-communicative purposes, or upon whether any particular person or persons might applaud or oppose the actor's conduct.

S. Rep. No. 152, *supra*, at 10 (quoting *Texas* v. *Johnson*, 109 S. Ct. at 2543).

The House bill, H.R. 2978, differed from the Senate bill only in minor respects. Like S. 1338, the House bill was intended to "respond[] to the Supreme Court decision in *Texas* v. *Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey." H.R. Rep. No. 231, *supra*, at 2. By "delet[ing] the language 'casts contempt upon' and the words 'publicly' and 'defiling,'" H.R. 2978 was designed to amend Section 700 "to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner." *Id.* at 8. Thus, "any conduct resulting in physical harm or damage to the flag, regardless of the actor's intent, is prohibited." *Ibid.*

On September 12, 1989, the House passed H.R. 2978 by a vote of 380 to 38. See 135 Cong. Rec. H5562 (daily ed. Sept. 12, 1989). The Senate thereupon proceeded to consider the House bill, as opposed to S. 1338, and passed it by a vote of 91 to 9, after adding two amendments. See 135 Cong. Rec. S12655 (daily ed. Oct. 5, 1989). The amended bill was then returned to the House, where it again received overwhelming approval, by a vote of 371 to 43. See 135 Cong. Rec. H6697 (daily ed. Oct. 12, 1989). H.R. 2978 became law on October 28, 1989, as the Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777. Section 700(a) of Title 18, United States Code, now provides:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United

States shall be fined under this title and imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

SUMMARY OF ARGUMENT

I. Appellees' conduct in burning flags was expressive, but that fact only begins the analysis. Incidental regulation of expressive conduct generally is permissible if the government forbids the conduct without drawing distinctions on the basis of the message conveyed. The Flag Protection Act of 1989 does just that. Even if we assume, however, that the Act directly regulates expression, it still should be upheld as long as it is a proper "time, place, or manner" restriction within the meaning of this Court's cases. Thus, the Act must be content neutral, must further a substantial governmental interest, and must leave open alternative channels of communication. *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989).

The Act is content neutral. It differs from statutes whose application this Court has previously struck down, in that it punishes only permanent disfigurements of the flag, and does so without regard to the accompanying words or motives, any attitude of "contempt," or any inquiry into the offensiveness of the defendant's actions. The statute proscribes specified conduct, which may be respectful or contemptuous, and it fails to reach other specified conduct, even when that conduct is intended to communicate disrespect. That is content neutrality.

The contrary holdings of the district courts are based on the erroneous notion that a law is not content neutral whenever it protects symbolic values. But content neutrality depends on whether the government restricts communication based on its content, not on whether the government itself wishes to communicate a message. Likewise, there is no merit whatever to the assertions below that a law can be deemed content based solely because of

the motivations of individual legislators. It is the scope of a statute, not statements in the debates leading to its passage, that demonstrates the intent of the legislature to forbid conduct without regard to the message conveyed by that conduct. This Court squarely so held in *United States* v. *O'Brien*, 391 U.S. 367, 382-384 (1968).

The Act also is narrowly tailored to serve a significant governmental interest. One need look no further than this Court's cases in order to conclude that the government's interest in protecting the flag, as a symbol of everything that America stands for, is and always has been deemed legitimate and quite substantial. Indeed, the Court reiterated in *Texas* v. *Johnson* that "the Government ha[s] a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our coun[try]'" 109 S. Ct. 2533, 2547 (1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 412 (1974)).

Finally, the Act unquestionably leaves open ample alternative methods for would-be flag burners to convey their messages. It does not prohibit any form of verbal expression, it does not prohibit even the burning of a wide variety of symbols of the United States, and it does not prohibit any conduct, no matter how disrespectful or contemptuous, with respect to worn-out or outmoded flags.

II. Nothing in this Court's decision in *Texas* v. *Johnson* requires a different result. The statute at issue in that case applied only against actions that gave "offense" to others, and Johnson was punished directly for "the message he conveyed." 109 S. Ct. at 2543. The Flag Protection Act of 1989, by contrast, is content neutral and is "aimed at protecting the physical integrity of the flag in all circumstances" (*ibid.*), "regardless of the motive or political message of any flag burner." H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989). That is no accident. Congress carefully considered—and followed—the advice of eminent constitutional scholars in crafting the Act to comport with *Johnson* and this Court's prior cases.

Congress's carefully deliberated conclusion that this statute is constitutional has additional significance. This Court has often recognized that special respect is owed to the considered interpretation of the Constitution by a coordinate branch. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). The explicit congressional determination that this is—and is intended to be—a content-neutral statute is one that a court should not lightly second-guess. Likewise, the deference owed to Congress is at its zenith when Congress makes the inherently legislative judgment that a particular governmental interest is strong. Here, Congress—by overwhelming majorities—has determined that the Nation has a powerful interest in protecting the physical integrity of the American flag, and this Court should not substitute a contrary conclusion.

ARGUMENT

THE FLAG PROTECTION ACT OF 1989 DOES NOT VIOLATE THE FIRST AMENDMENT

Appellees burned flags in order to express political messages. It follows that this case raises a First Amendment issue. But it is equally obvious, both from first principles and from this Court's cases, that not all conduct intended to convey political messages is protected by the First Amendment, or even subjected to exacting scrutiny. Vandalism, terrorism, or public nudity can be very effective ways of expressing political messages, but they nonetheless may be prohibited despite the fact that such criminal statutes may have an incidental effect on freedom of speech. Thus, this Court has upheld a law banning the burning of draft cards, even though the conduct so proscribed in the case that came before this Court was unquestionably expressive. *United States* v. *O'Brien*, 391 U.S. 367 (1968). This Court also has suggested that a content-neutral ban on the unauthorized wearing of military uniforms would be constitutional, even though such a prohibition would reach expressive conduct. *Schacht* v. *United States*, 398 U.S. 58, 61 (1970). Moreover, the Court repeatedly has upheld even direct regulations of expressive conduct when those regulations do not depend on the message conveyed by the conduct but instead govern only its permitted time, place, or manner. See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (overnight sleeping in connection with a demonstration is expressive but nevertheless can be proscribed). The Flag Protection Act of 1989 can be upheld under either of those two lines of authority.

I. THE ACT IS VALID AS A "MANNER" RESTRICTION

In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), this Court invalidated under the First Amendment a state statute regulating flag burning for expressive purposes. At the same time, however, the Court intimated that a statute "aimed at protecting the physical integrity of the flag in all circumstances" would be constitutional. *Id.* at 2543 (citing *Smith* v. *Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting)). The key distinction between the two statutes is that the latter regulates conduct without regard to the message that it may or may not convey, and any restrictions on expression are merely an incident of that regulation. See generally *O'Brien*, 391 U.S. at 376-377, 381-382.

Like the statute upheld in *O'Brien*, the Flag Protection Act of 1989 regulates conduct in an evenhanded and content-neutral way. It defines with precision the actions that will not be permitted, and it makes irrelevant the message that may be conveyed or perceived. Furthermore, the Act plainly protects governmental interests that are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. The Act may sweep within its terms some expressive conduct—as well as nonexpressive conduct—but that was true in *O'Brien* as well, and does not call for heightened scrutiny.[1]

---

[1] Thus, Judge Rothstein was quite wrong to apply heightened scrutiny just because the Flag Protection Act can be said to be "related to expression." There is no substantive significance to the

Even if we assume, however, that the Flag Protection Act directly regulates expression, by no means does it follow that the Act is unconstitutional. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark* v. *CCNV*, 468 U.S. at 293. Any restriction on expression that even arguably exists in this case involves not any particular message, or even the time or place of communicating that message, but solely the *manner* in which the message is communicated. Nothing inhibits appellees from conveying—by word or, within limits, by deed—their opposition to "various aspects of United States domestic and foreign policy" (89-1433 J.S. App. 2a). But Congress, after solemn deliberation, has concluded that one *manner* of expression—mutilating, defacing, physically defiling, burning, maintaining on the floor or ground, or trampling on an American flag—is not open to them or to anyone else.

Therefore, on the generous assumption that the Flag Protection Act should be viewed as a statute regulating expression, it is appropriate to analyze the constitutionality of the Act under this Court's "time, place, or manner" restriction cases. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 536 (1987) ("Section 110 [limiting use of the word 'Olympic'] restricts only the *manner* in which the SFAA may convey its message.") (emphasis added). Like the

---

fact that "[t]he *Johnson* [opinion] itself uses the phrases 'related to expression' and 'related to the suppression of expression' interchangeably" (89-1434 J.S. App. 11a). The Court in *Johnson* plainly used the phrase "related to expression" merely as shorthand for the standard phrase "related to the suppression of expression," which has been used at least since *O'Brien*, 391 U.S. at 377, to distinguish strictly scrutinized regulations of expression from leniently scrutinized regulations of conduct with incidental impacts on expression. It is inconceivable that the Court meant to effect a radical expansion of the category of laws that will be strictly scrutinized under the First Amendment to encompass every law "related to expression" but unrelated to the suppression of expression. See *Senate Hearings* 203-204, 208 (testimony of Dean Geoffrey R. Stone); *id.* at 543-544, 567 (testimony of Prof. Walter Dellinger).

restrictions on the permissible color and size of reproductions of currency upheld in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), the Act's restrictions on damaging the flag do not require "the Government * * * to evaluate the nature of the message being imparted in order to enforce" them. *Id.* at 656 (plurality opinion). They regulate not the content but the *manner* of conveying the message.

On many occasions, most recently in *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746 (1989), this Court has set forth a three-part test for the validity of time, place, or manner restrictions. The restrictions must be content neutral, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. 109 S. Ct. at 2753; see also *Regan* v. *Time, Inc.*, 468 U.S. at 648 (opinion of the Court). The Flag Protection Act meets each of those three criteria.

A. The Flag Protection Act Is Content Neutral.

1. *Unlike prior flag statutes, the Act covers actions that permanently damage a flag, without regard to the individual's message.*

The Flag Protection Act of 1989 is, on its face, even-handed. The courts below acknowledged as much. 89-1434 J.S. App. 10a ("the Act on its face is applicable to anyone who engages in certain conduct regardless of the actor's intent or the impact of the conduct"); 89-1433 J.S. App. 13a ("on the face of the statute the same rules apply to everyone").[2] The Act thus differs from any flag

---

[2] It simply is not true, as Judge Green went on to assert, that "[t]he application of the Flag Protection Act turns on whether the speaker seeks to show disrespect for the flag" (89-1433 J.S. App. 14a n.8). Nor is it true that, "in protecting the flag for those who wish to waive [*sic*] it in support of [symbolic] causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message" (*id.* at 14a). The Act prohibits specified *conduct*—such as burning the flag—without regard to the intention of the so-called "speaker," and it fails to reach other

protection statute that has ever before been passed by Congress or considered by this Court.

Unlike the 1968 federal flag protection statute, 18 U.S.C. § 700 (1982), the Act does not contain any provision punishing the act of "cast[ing] contempt" on the flag. Unlike the Texas statute at issue in *Johnson*, the Act does not limit its prohibitions to acts that "seriously offend one or more persons." Unlike the state statute at issue in *Spence* v. *Washington*, 418 U.S. 405 (1974), the Act does not reach any conduct that does not "permanently disfigure the flag or destroy it" (*id.* at 415). Unlike the Massachusetts statute at issue in *Smith* v. *Goguen*, 415 U.S. 566 (1974), the Act does not punish anyone merely for treating the flag "contemptuously." And unlike the state statute at issue in *Street* v. *New York*, 394 U.S. 576 (1969), the Act does not in any way reach verbal flag contempt.

These are not idle distinctions. The Court in each of its flag cases was careful to emphasize that its analysis would not control a case in which the particular defect noted above was lacking. See *Johnson*, 109 S. Ct. at 2543; *Spence*, 418 U.S. at 415; *Smith* v. *Goguen*, 415 U.S. at 581-582 ("Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."); *Street*, 394 U.S. at 594 ("we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest"). Thus, as Professor Laurence H. Tribe testified before the Senate Judiciary Committee after analyzing each of those cases, "[n]ot one [J]ustice has ever expressed doubt about" the proposition "that the goal of protecting the physical integrity of flags * * * is attainable under the Constitution as it

specified *conduct*—such as waving the flag—equally without regard to message. The person who waves his flag while shouting epithets at it cannot be prosecuted, and the person who burns his flag with the utmost respect can be.

now stands." *Senate Hearings* 142; see also *id.* at 537 (statement of Prof. Walter Dellinger).

The Flag Protection Act is an attempt to meet this Court's concerns in attaining the goal of protecting the physical integrity of flags under the Constitution as it now stands. The Act plainly proscribes the respectful as well as the contemptuous burning of any unsoiled flag (18 U.S.C. § 700(a)(1)), and it plainly fails to reach the contemptuous as well as the respectful disposition of any worn or soiled flag (18 U.S.C. § 700(a)(2)). The Act was intended to prohibit specific *conduct* that is designed permanently to damage an American flag, without regard to the actor's motive, the message he intends to convey, or the effects that his actions have on others. See pages 4-5, *supra*; *Senate Hearings* 183-184, 194-195 (statement of Dean Geoffrey R. Stone). That is content neutrality.[3]

2. The Act is not content based merely because it protects a symbol.

Both courts below determined that, despite its facial evenhandedness, the Flag Protection Act is not content neutral. 89-1433 J.S. App. 12a-14a; 89-1434 J.S. App. 9a-11a. According to the two district courts, *any* legislation that protects the flag "as a symbol" is not content neutral, whatever its scope. That reasoning reflects a fundamental misunderstanding of this Court's cases.

Whether a law is content neutral depends entirely on whether the expression that it restricts receives differen-

[3] Judge Rothstein "quickly dismissed" the argument, that, because it protects the physical integrity of the flag in all circumstances, the Flag Protection Act is content neutral. 89-1434 J.S. App. 11a-12a n.6. She pointed out that flying the flag in inclement weather and carrying it into battle are not prohibited. If those actions are not prohibited, however, it is simply because one who flies the flag in inclement weather or carries it into battle has not "knowingly" *acted* to harm the flag. In order to protect the physical integrity of the flag in all circumstances, Congress has required that no one knowingly destroy that physical integrity. No First Amendment doctrine requires Congress to go further and insist that no one even expose the flag to situations that might threaten it.

tial treatment on the basis of its content; it does not depend in any way on the fact that the government is itself expressing views. Government-enforced orthodoxy is anathema to our constitutional system, but so is the idea that the government must itself be a philosophical cipher, standing for absolutely nothing. It is the essence of democratic governance, not a suspicious activity, for the people's elected representatives to decide what is and what is not deserving of legal protection.

Thus, as Justice (then Judge) Scalia pointed out four years ago, "the guarantee of freedom of speech 'does not mean that government must be ideologically "neutral,"' or 'silence government's affirmation of national values,' or prevent government from 'add[ing] its own voice to the many that it must tolerate.'" *Block* v. *Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (quoting L. Tribe, *American Constitutional Law* § 12-4, at 588, 590 (1978)).[4] A law prohibiting anyone from harming a bald eagle could be justified in large part by the government's recognition of the value of that bird "as a symbol," but nothing in this Court's cases suggests the bizarre conclusion that such a law is content based. As Professor Tribe commented in testimony before the Senate Judiciary Committee (*Senate Hearings* 151-152):

> We ban the desecration of gravesites * * * primarily because most people think of such conduct as deeply offensive in itself, regardless of whether any particular act of grave desecration is meant to convey an offensive message, or is so interpreted by a particular observer. And the fact that we enact such a prohibition largely out of concern for what a grave symbolizes or represents does not transform the prohibition into one secretly based on the desire to suppress a message. * * *
>
> The principle I have in mind is the same as the one which justifies especially harsh punishment for those who deface places of religious worship as opposed to places of business. Places of worship * * * are, of course, inherently expressive of religious values, and are cherished in large part *because* they express those values. But it simply does not follow that the decision to give such places special protection * * * represents a desire to suppress, censor, or penalize whatever anti-religious message someone who defaces a church or synagogue might want to convey.

[4] This Court agreed with the First Amendment holding of *Block* in *Meese* v. *Keene*, 481 U.S. 465 (1987).

If the government enacts an evenhanded statute protecting bald eagles, or gravesites, or places of religious worship, or American flags, that statute is not and cannot be *ipso facto* content based.

For these reasons, there is no merit to the self-referential theory that any law protecting a symbolic object fails the content-neutrality test because it only limits the expression of those who wish to advance an idea opposite to the one represented by the protected object. No decision of this Court supports such a radical theory.[5] But even if the theory had validity in some circumstances, it would not apply to the flag, which does not represent

[5] To say that a law protecting a symbol is content based because it affects only those who oppose the symbol's underlying message would be to say, in essence, that content neutrality depends not only on the evenhandedness with which a law *treats* all persons but also on the uniformity of its *impact* on everyone. But no holding of this Court supports the application of such a disparate impact theory. See *Johnson*, 109 S. Ct. at 2557 n.* (Stevens, J., dissenting). There was no need for the Court to adopt such a theory in *Johnson*, because the Texas statute on its face discriminated between those who offended others and those who did not. The adoption of a disparate impact theory of free speech analysis would revolutionize First Amendment doctrine. For example, it would have required a different result in *Clark* v. *CCNV*, *supra*, where the ban on sleeping in Lafayette Park surely impeded those who wished to communicate about the plight of the homeless more than it impeded any other "speakers," and in *O'Brien*, where the impact of the ban on burning draft cards was felt primarily if not exclusively by antiwar protestors. These and other severe problems with the application of disparate impact analysis in the First Amendment context are thoroughly addressed in Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 81-86 (1987).

any single idea or value. "[T]he flag is worthy of protection not because it represents any one idea, but because it represents many ideas. As the testimony of every witness demonstrated, the flag represents different things to different people." S. Rep. No. 152, *supra*, at 3. See also *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting) (The flag "does not represent any particular political philosophy • • • [and] is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."). The fact that the Flag Protection Act preserves the physical integrity of that multifaceted symbol cannot render it content based.

3. *The Act cannot be deemed content based because of the motivations of individual legislators.*

Nor is a law content based just because some legislators were motivated more by a desire to reach conduct conveying one particular message than conduct conveying a different message. What matters is whether the legislature discriminated on the basis of content in determining the conduct that it would proscribe, not whether legislators were more enthusiastic about prohibiting some conduct than about prohibiting other conduct.[6]

---

[6] Many of the proponents of a constitutional amendment to overturn this Court's decision in *Johnson* argued that distinctions *should* be drawn between protestors like Gregory Johnson and others whose treatment of the flag indicated respect. Accordingly, appellees will have no trouble in trotting out statements from the legislative history that can be misused to ascribe an impermissible motivation to Congress. As we discuss in text, however, that is not a proper way to determine whether a statute is content neutral. Moreover, those sentiments were expressed in support of an approach that Congress as a whole *rejected* in favor of an approach that scrupulously avoids content-based distinctions. See generally H.R. Rep. No. 231, *supra*, at 2; S. Rep. No. 152, *supra*, at 10; 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (remarks of Sen. Biden); *id.* at S12620 (daily ed. Oct. 4, 1989) (remarks of Sen. Biden). Thus, although we do not think that the legislative history has a proper role to play in this Court's determination whether the Act is content neutral, a properly focused inquiry into the legislative history would in any event confirm the content-neutral nature of the statute.

In particular, nothing could possibly be more incorrect than Judge Rothstein's statement (89-1434 J.S. App. 10a), echoed by Judge Green (89-1433 J.S. App. 13a), that "it is the *reason* for the legislation and not its *scope* which determines content-neutrality." The flaw in that statement is not that the "reason" for legislation is irrelevant, but that the only proper way to determine the reason for any legislation is to look at its scope. Here, the scope of the legislation is to reach certain well-defined actions directed against the flag and to exempt others, and the only reliable evidence of *Congress's*—as opposed to any individual legislator's—"reason" for enacting the statute is the text of the statute, which shows what actions Congress was willing (however enthusiastic or unenthusiastic particular legislators may have been) to interdict. In this case, Congress's approach is entirely in keeping with Justice Brennan's statement that "the best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors." *Boos* v. *Barry*, 485 U.S. 312, 336-337 (1988) (opinion concurring in part and concurring in the judgment).

One need not read tea leaves from this Court's opinion in *Johnson*, as the courts below did, in order to determine whether it is a law's "scope," or its "reason" as shown by legislative history, that determines content neutrality. For the Court has addressed that question directly, in a passage fully applicable to this case:

> O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.
>
> It is a familiar principle of constitutional law that this Court will not strike down an otherwise con-

> stitutional statute on the basis of an alleged illicit legislative motive. * * *
>
> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature * * *. It is entirely a different matter when we are asked to void a statute * * *. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 382-384 (footnote omitted); accord *Edwards* v. *Aguillard*, 482 U.S. 578, 636-639 (1987) (Scalia, J., dissenting).

It is certainly true that this Court on occasion has spoken in terms of legislative "purpose" or "justification" in describing the content-neutrality test. See, *e.g.*, *Ward*, 109 S. Ct. at 2754; *Boos*, 485 U.S. at 319-321 (plurality opinion); see also *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), quoted in *Johnson*, 109 S. Ct. at 2540. But the Court has never used that term as an excuse to invoke legislative history in order to strike down facially neutral legislation. See *Senate Hearings* 163 (testimony of Prof. Tribe).

When the Court has invalidated legislation on the basis of its content-based "purpose," the suspect "purpose" has been evident either from the statute itself (*e.g.*, *Boos*, 485 U.S. at 318-319 (plurality opinion) ("[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government")) or from the government's complete inability to offer *any* reason for the prohibition other than banning the expression of particular points of view associated with the forbidden conduct (see generally *CCNV* v. *Watt*, 703 F.2d at 624-625 (Scalia, J., dissenting) (analyzing cases)).[7] Neither situation exists here. The Flag Protection Act is carefully crafted *not* to make its prohibitions turn on the content of any "expression" associated with the forbidden conduct, and the government's interest in protecting the physical integrity of *all* unworn flags—an interest repeatedly recognized as valid by this Court—is aimed at completely unexpressive conduct, as well as conduct that damages a flag as a protest, as well as conduct that somehow injures a flag pursuant to expression intended as a show of respect.

In sum, nothing that was said in the opinions below comes close to refuting the obvious fact that the Act is content neutral. One may perhaps question how much weight should be accorded the government's interest in protecting the flag as a symbol—a point addressed in the next section—but the fact that the government's interest relates to national symbols has absolutely nothing to do with whether Congress has drawn content-based distinctions. Likewise, the legislative history is no basis for imputing expression-prohibiting purpose to a pure conduct-regulating statute that has non-expression-related justifications. This step of the district courts' analysis is insupportable.

B. The Flag Protection Act Is Narrowly Tailored To Serve A Significant Governmental Interest.

Notwithstanding the effort by the courts below to pigeonhole the Flag Protection Act with "content-based" laws that restrict expression directly, the true thrust of the district courts' opinions is that the government's interest in preserving the flag, as a symbol of all that this Nation stands for, is either illegitimate altogether or so very weak as to be outweighed by the positive social value of the forbidden conduct. That is the only coherent explanation for striking down a statute not on the the basis

---

[7] Thus, as Justice (then Judge) Scalia concluded, the relevant distinction is between "conduct-prohibiting" laws and "expression-prohibiting laws." 703 F.2d at 626. The distinction depends on the laws and not on the motivation of the legislators.

of what it forbids, but on the basis of what the government is trying to accomplish. But that low estimation of the government's interest in preserving the symbolic value of the flag is hardly compelled by this Court's cases; in fact, this Court's cases squarely contradict that view.

Halter v. *Nebraska*, 205 U.S. 34 (1907), may be explainable as a case resting on the "commercial speech" doctrine (see *Johnson*, 109 S. Ct. at 2545 n.10), but that does not make its pronouncements about the flag any less worthy of respect in a different context. Speaking through the first Justice Harlan, the Court wrote:

> It is not * * * remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished upon the spot. * * *
>
> Such an use [for trade and traffic] tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor.

205 U.S. at 41-42. The *Halter* Court, it is true, had no occasion to pass on the status of a general flag protection law under the First Amendment, but there is no doubt what the Members of the Court would have thought of the argument that the United States had only an illegitimate or a weak interest in preservation of the flag's symbolic power.

In *Street*, the Court, speaking through the second Justice Harlan, wrote that "disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history." 394 U.S. at 594 (citing *Halter*). The Court overturned a conviction because it could have been based on spoken words, but it was careful to point out that it was not resolving the question whether an expressive act of flag burning was entitled to constitutional protection. *Ibid.* Similarly, in *Smith* v. *Goguen*, the Court was surely well aware that *any* flag protection statute will necessarily be designed to protect the flag's symbolic value, but the Court hardly implied any blanket condemnation of such laws. Instead, the Court affirmatively encouraged legislators to draft such statutes, but to do so with specificity and care. 415 U.S. at 581-582 & nn.30-31. And in *Spence*, the Court "assume[d], *arguendo*" (418 U.S. at 414), that the State had a legitimate interest "based on the uniquely universal character of the national flag as a symbol" (*id.* at 413). In each of these cases, of course, a strong dissent—joined by one or more of Chief Justice Warren, Chief Justice Burger, (now) Chief Justice Rehnquist, Justice Black, Justice White, Justice Fortas, or Justice Blackmun—suggested that the majority did not go far enough in protecting the flag's unique symbolic value.

Most important, the argument that the courts below accepted on the basis of *Texas* v. *Johnson* is in fact *foreclosed* by *Johnson*. The Court in that case wrote:

> [W]e do not doubt that the Government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." We reject the suggestion, urged at oral argument by counsel for Johnson, that the Government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed.

109 S. Ct. at 2547 (citation omitted).

Thus, it is irrefutable that this Court has consistently recognized as legitimate the government's interest in protecting the flag *as a symbol*. That being so, there is no possible basis to deem that interest so weak as to be outweighed by the relatively minor First Amendment interest in expressing oneself through the particular manner

of burning or otherwise performing a forbidden act on a flag. Indeed, although the Constitution may well assign to this Court the duty to separate legitimate from illegitimate governmental interests in many instances, the determination of the *weight* that should be accorded to a legitimate interest is quintessentially a legislative matter. Congress's action in promptly passing the Flag Protection Act by overwhelming margins leaves no doubt about how the Legislative Branch assesses the strength of the government's interest. The second part of the test for sustainable "time, place, or manner" restrictions, to the extent that it focuses on the strength and legitimacy of the government's interest, is plainly met.

There remains the requirement that the legislation be narrowly tailored to achieve its legitimate end. But, as this Court was at pains to emphasize last Term, that requirement is *not* a "least-intrusive-means" requirement that allows a court to substitute every possible alternative for the statute that the legislature actually passed and to strike that statute down if unsatisfied that the legislature has made the optimal choice. *Ward*, 109 S. Ct. at 2756-2760. Rather, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 2758. Here, there is no reason to believe that Congress could have legislated more narrowly and still achieved its legitimate end of protecting the physical integrity, and hence the symbolic value, of the flag. In fact, the courts below focused not on *narrower* regulations that would have achieved the government's end, but on hypothetical events that supposedly made the legislation *not broad enough* to achieve that end. See, *e.g.*, 89-1434 J.S. App. 12a n.6. There is simply no basis for thinking that this carefully crafted statute impinges on free speech more than is necessary to preserve the flag's unique status. See *Clark* v. *CCNV*, 468 U.S. at 297.

This Court in *Johnson* stated that no "separate juridical category exists for the American flag" and that there should not be "create[d] for the flag an exception to the joust of principles protected by the First Amendment." 109 S. Ct. at 2546. The Flag Protection Act honors those views, but the opinions below do not. By subjecting flag protection legislation to especially strict scrutiny merely because that which is deemed worth preserving is symbolic rather than materialistic, and by rejecting a governmental interest that this Court has *always* regarded as legitimate and strong, the district courts created an exception to the usual principles guiding decision under the First Amendment. Under standard First Amendment doctrine, however, the statute is content neutral and is based on a legitimate purpose, and therefore it should be upheld as long as it does not foreclose alternative methods of expression of the same ideas.

C. The Flag Protection Act Allows Ample Alternative Avenues Of Expression.

That flag burners with an expressive purpose have ample alternative ways to express themselves is so obvious that it should require little explanation. To protest American policies, or express any other idea they wish, individuals may use a virtually limitless variety of media of verbal expression, and they may engage in a wide range of conduct as well. Indeed, they may engage in conduct quite similar to flag burning: nothing in the law forbids a symbolic burning of an effigy of Uncle Sam, for example, or burning any red, white, and blue cloth that is not a flag, or immolating any other privately owned symbol of America, no matter how offensive or provocative the act may be. Moreover, the statute permits the flag itself to be used in a variety of expressive ways. Only "one rather inarticulate symbolic form of protest" (*Johnson*, 109 S. Ct. at 2554 (Rehnquist, C.J., dissenting))—physical destruction of the American flag—is made illegal.[8]

[8] To be sure, the inability of a protestor to draw attention to himself by engaging in particularly disruptive conduct may have some

The only basis for any confusion on this point is a possible misinterpretation of the footnotes in *Spence*, 418 U.S. at 411 n.4, and *Johnson*, 109 S. Ct. at 2546 n.11, stating that it is not a *sufficient* basis for the abridgment of First Amendment freedoms that there are alternative channels of communication. The point here, of course, is not that the existence of such alternatives by itself suffices to save an otherwise invalid statute, but that the existence of such alternatives is necessary in addition to the other prerequisites to a valid time, place, or manner restriction already discussed. See, *e.g.*, *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). Those prerequisites are met here, and the existence of ample alternative channels of communication confirms that the Flag Protection Act is valid under standard First Amendment doctrine.

Nothing could be more illiberal than the attitude of someone who insists that he will convey his message in one and only one way—notwithstanding the existence of many effective alternatives, and the determination of popularly elected legislators that that which the protestor wishes to destroy is something worth preserving. Our First Amendment quite properly ensures in no uncertain terms that a Gregory Johnson or a Shawn Eichman will not be silenced—or punished because of his message—but those majestic commands of the Constitution are not

---

marginal effect on his ability to attract a wide audience. But attention-getting and free speech are not the same thing. The First Amendment does not invalidate a legitimate restriction on expressive conduct, where alternative methods of expression exist, merely because the proscribed conduct is the means that the speaker believes is most effective for communicating his message. *See Clark* v. *CCNV*, 468 U.S. at 294-296; *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 653-655 (1981). Thus, a modern-day Lady Godiva would, entirely consistent with the First Amendment, be relegated (if she wished to stay within the law) to forms of expression less notorious than nude horseback riding. Similarly, unless this Court is prepared to reverse its previous pronouncements and brand the government's interest in protection of the physical integrity of the flag "illegitimate," there is no First Amendment right to harm the flag just because doing so will attract attention.

at issue here. Far from being silenced, appellees were free to dramatize their points of view in many ways, or to speak their minds in eloquent or crude terms, as they chose. What they were not free to do, but chose to do anyway, was to defy the statute that tries in an even-handed way to preserve the flag for everyone. The uniquely American values that the flag symbolizes—and the Constitution enshrines—do not just protect the lonely protestor against an intolerant public that will brook no debate; they also protect the lonely flag against an intolerant protestor who will accept no method of debate but his own destructive one.

II. THIS COURT'S DECISION IN *TEXAS* v. *JOHNSON* DOES NOT REQUIRE INVALIDATION OF THE FLAG PROTECTION ACT

The district courts invalidated the Flag Protection Act of 1989 in the apparent belief that the constitutionality of the federal statute is governed by this Court's decision in *Texas* v. *Johnson*. But the Court's analysis in *Johnson* was limited by its clear terms to content-based flag desecration statutes. Indeed, Congress concluded—based on a careful review of the relevant constitutional principles—that the Flag Protection Act is materially distinguishable from the Texas law before the Court in *Johnson*, because it is (and is intended to be) content neutral, and that the federal statute would pass muster under the First Amendment. That considered constitutional judgment of a coequal branch of the federal government also distinguishes this case from *Johnson* and weighs in favor of upholding the federal statute.

A. This Court's Decision In *Johnson* Rested On The Determination That The Texas Statute Was *Not* Content Neutral; The Flag Protection Act, By Contrast, *Is* Content Neutral.

The Texas statute before the Court in *Johnson* made it a crime to "desecrate[]" the flag; that term was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend

one or more persons likely to observe or discover his action." 109 S. Ct. at 2537 n.1. The Court held that, because the statute applied "only against impairments [of the flag's physical integrity] that would cause serious offense to others," it was content based: Texas law restricted Johnson's speech on the basis of "the message he conveyed." *Id.* at 2543.

The conclusion that the Texas statute was not content neutral dictated the remainder of the Court's analysis. The Court subjected the state interests advanced in support of the statute to "'the most exacting scrutiny,'" an extremely strict standard reserved for content-based restrictions on speech. *Johnson*, 109 S. Ct. at 2543 (quoting *Boos*, 485 U.S. at 321). And, as is typically the case when a statute is examined under that stringent standard, the state interests underlying the statute were found insufficiently weighty to justify the content-based restriction. 109 S. Ct. at 2544-2548.

It is apparent that the Court's analysis in *Johnson* does not apply in the present case because the Flag Protection Act *is* content neutral. Instead of the strict First Amendment standard applicable to content-based limitations on speech applied in *Johnson*, the constitutionality of this evenhanded federal statute turns on a considerably less demanding standard. A content-neutral time, place, or manner restriction will be upheld against First Amendment challenge if the restriction is narrowly tailored to serve a significant governmental interest and leaves open adequate alternative means of expression. As we have shown above, the Act plainly satisfies that test.

Indeed, the Court in *Johnson* expressly recognized that its analysis would not apply to a statute like the Flag Protection Act. The Court supported its conclusion that the Texas statute was content based by contrasting that law with a (then) hypothetical statute "aimed at protecting the physical integrity of the flag in all circumstances." 109 S. Ct. at 2543. The clear implication of the Court's comparison is that a statute applicable "in

all circumstances" would be subject to less stringent constitutional analysis.

Of course, it is not mere happenstance that the Flag Protection Act does not contain the constitutional defect identified by the Court in *Johnson*. Congress expressly set out to amend the federal statute prohibiting destruction of the flag to eliminate the constitutional flaws identified in *Johnson*. Distinguished constitutional scholars testified that the principal defect in the Texas statute was that its applicability turned on the content of the expressive message that Johnson sought to convey. As Dean Stone observed in his testimony before the Senate Judiciary Committee, "[u]nlike the Texas law invalidated in *Johnson*, the proposed legislation is not content based, it is not directly related to the suppression of free expression, and its constitutionality is thus not controlled by the principles that dictated the outcome in *Johnson*." *Senate Hearings* 184; see also *id.* at 527 (Prof. Gordon B. Baldwin and Brady C. Williamson) (the "greatest flaw [in the Texas statute] was that it punished the expression not of any point of view but the expression of only one point of view, defined as 'offensive' by the beholder. It was not content-neutral"); *id.* at 542-543 (Prof. Dellinger); *id.* at 723 (Prof. Henry Monaghan).

Moreover, after considering this testimony, Congress itself concluded that "the decision in *Johnson* was expressly predicated on the determination that the Texas law was triggered by the offensiveness of the actor's conduct." S. Rep. No. 152, *supra*, at 8. "[T]he problem with the Texas statute was that it * * * 'was not * * * content-neutral.'" *Ibid.* (citation omitted); see also *id.* at 12. As the House Judiciary Committee put it, "[i]n all of [this Court's opinions in cases involving flag desecration], the Court indicated that it would look differently on a content-neutral statute that would protect the physical integrity of the flag in all circumstances, one that focused solely on conduct and did not turn on the message being conveyed by the flag burner." H.R. Rep. No. 231, *supra*, at 7-8.

Congress thus adopted the very statute that the Court itself excluded from its holding in *Johnson*—a law "aimed at protecting the physical integrity of the flag in all circumstances." For that reason, the decision in *Johnson* does not dictate the outcome of a constitutional challenge to this congressional enactment.

B. Congress's Determinations That The Flag Protection Act Is Content Neutral And Therefore Constitutional Are Entitled To Deference.

There is a second critical distinction between *Johnson* and the present case. Although there was no evidence that the Texas legislature had ever thought about the constitutional problems raised by the state flag desecration statute, Congress gave careful consideration to the constitutionality of the Flag Protection Act and concluded that the statute comports with the requirements of the First Amendment. That determination by a coequal branch of the federal government is entitled to considerable deference.

"Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform,'—the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted); see also *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The Court has deferred to Congress's constitutional judgments in a variety of contexts, including the assessment of a statute's validity under the First Amendment. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64.

Congress labored mightily to ascertain how the relevant constitutional principles applied to the Flag Protection Act. The principal focus of the congressional

hearings was the constitutionality of the proposed legislation. A number of scholars testified that the measure comports with this Court's First Amendment jurisprudence. See, *e.g.*, *Senate Hearings* 541-545 (Prof. Dellinger); *id.* at 526-534 (Prof. Baldwin and Williamson); *id.* at 724 (Prof. Monaghan). The committee reports contain lengthy discussion of the statute's validity and conclude that the Flag Protection Act is consistent with the First Amendment. S. Rep. No. 152, *supra*, at 9-15; H.R. Rep. No. 231, *supra*, at 7-9. By adopting the statute, Congress endorsed that conclusion. See also U.S. Const. Art. VI ("[t]he Senators and Representatives * * * shall be bound by Oath or Affirmation, to support this Constitution").

In these circumstances, where the Senate and House of Representatives have each expressly focused on and debated the constitutional issues, Congress's determination that the statute does not violate the First Amendment is entitled to substantial deference. In particular, the Court should defer to two congressional findings, peculiarly legislative in nature and the subject of considerable attention, that underlie Congress's assessment of the statute's constitutionality.

First, Congress concluded that the statute is content neutral. The Senate Report stated that, unlike the law struck down in *Texas* v. *Johnson*, the Flag Protection Act is independent of the likely communicative impact of the conduct and aimed at protecting the physical integrity of the flag in all circumstances. S. Rep. No. 152, *supra*, at 10; see also H.R. Rep. No. 231, *supra*, at 2. Surely Congress's determination regarding the scope of its statute is a subject on which Congress is especially competent to opine.

Second, Congress made clear that protection of the physical integrity of the flag is an important governmental interest. The Senate Judiciary Committee observed that "the American flag has an historic and intangible value unlike any other symbol." S. Rep. No. 152, *supra*, at 2. It characterized the flag as "the visible

embodiment of our Nation," noting that the flag led American troops into battle, "signifies our national presence in schools, public buildings, battleships and airplanes"; is "joyously flown over town squares on the Fourth of July"; and is the subject of the Pledge of Allegiance. *Ibid.* "The flag of the United States * * * is a unique symbol that serves a unique purpose. Today, in what is the most heterogeneous and diverse democracy in the world, the flag, in Chairman Biden's words, 'pulls people together * * * [and] helps generate a kind of tolerance that is required in such a diverse society.'" *Id.* at 3 (citation omitted); see also H.R. Rep. No. 231, *supra*, at 2, 9. This Court should not lightly reject Congress's considered judgment regarding the substantiality of this governmental interest.

Ultimately, of course, this Court must make the final decision with respect to these issues. But Congress's reasoned determination that the Flag Protection Act, which was passed by overwhelming majorities in both Houses, does not improperly interfere with freedom of expression should be accorded great weight in the Court's assessment of the statute's constitutionality.

CONCLUSION

The judgments of the district courts should be reversed.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
ANDREW J. PINCUS
ROY T. ENGLERT, JR.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

APRIL 1990